



Comptroller General  
of the United States

Washington, D.C. 20548

*J. Maeder*

1138254

## Decision

**Matter of:** Brookfield Development, Inc., Fuller and Company, and Colorado National Bank

**File:** B-255944

**Date:** April 21, 1994

Thomas L. Strickland, Esq., Brownstein, Hyatt, Farber & Strickland, for the protester.

Leigh Ann Holt, Esq., General Services Administration, for the agency.

Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Best and final offer (BAFO) which was received late by agency was properly rejected where the offeror telefaxed its BAFO too late to allow a reasonable time for it to be timely received.

### DECISION

Brookfield Development, Inc., Fuller and Company, and Colorado National Bank (Brookfield) protest the rejection of their offer under solicitation for offers (SFO) No. 93-16, issued by the General Services Administration (GSA) for the lease of office space for the Office of Surface Mining in Denver, Colorado. Brookfield's best and final offer (BAFO) was not considered for award because it was received late.

We deny the protest.

Five initial proposals were received. The agency conducted discussions with all offerors and requested BAFOs by 4 p.m. on October 15. Brookfield hand-delivered a BAFO before the time set for receipt of BAFOs. Also on October 15, at 3:30 p.m., Brookfield decided to submit another lower-priced offer.<sup>1</sup> Because Brookfield was concerned about meeting the 4 p.m. submission deadline, the firm contacted the

<sup>1</sup>Brookfield submitted its second BAFO as part of a joint offer with Fuller and the Colorado National Bank. The bank did not commit itself to participate in the joint offer until the afternoon of October 15, after Brookfield had submitted its first BAFO.

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contracting officer who, according to the protester, stated that GSA would accept its BAFO if Brookfield telefaxed it and delivered a hard copy to the agency before 5 p.m.

Although Brookfield began telefaxing the 11-page BAFO to GSA at 3:50 p.m., because the agency's telefax line was busy, the transmission was not completed until 4:16 p.m. The hard copy was delivered to the contracting officer at 4:50 p.m. The second Brookfield BAFO lowered the rental rates for the office space from the \$14.29 per square foot offered in the firm's first BAFO to \$11.48 per square foot. Brookfield's second BAFO was the lowest-priced offer submitted.

Subsequently, Brookfield contacted the contracting officer to withdraw Brookfield's first, higher-priced BAFO, but was told that it should not withdraw this offer because, if the evaluation of offers resulted in the elimination of all offers lower than Brookfield's \$14.29 per square foot offer, then its lower offer of \$11.48 per square foot could be considered even though it had been submitted late. According to the protester, it was told that GSA would make an award "in the near future."

GSA notified the protester on November 24 that it had awarded the contract to 1999 Broadway Partnership at a price lower than the price in Brookfield's first BAFO but higher than its second BAFO. The agency stated that Brookfield's second BAFO could not be considered for award because GSA had received the telefaxed transmission of that offer after 4 p.m.

Brookfield argues that GSA improperly rejected its second BAFO. The protester concedes that its facsimile BAFO was received by GSA after the time set for receipt of BAFOs. The protester argues, however, that the agency can only authorize facsimile offers if the facsimile equipment in the office designated to receive offers is of sufficient quality and capacity to ensure timely delivery of all offers.<sup>2</sup> Since its BAFO was received late, the protester argues that the contracting officer must have erred in authorizing facsimile transmissions. Indeed, Brookfield contends that the agency caused its offer to be received by GSA after the 4 p.m. deadline because the agency possessed only one facsimile transmission line which was busy and could not promptly accept the protester's BAFO. Because the

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<sup>2</sup>The protester bases this contention on Federal Acquisition Regulation (FAR) § 15.402(i) which instructs contracting officers, in determining whether or not to authorize facsimile proposals to consider, among other things, the availability, reliability, speed and capacity of the receiving facsimile equipment.

contracting officer's judgment regarding the capability of his office's facsimile equipment was faulty, the protester concludes, the agency made timely delivery of the BAFO impossible.

The protester also claims that GSA should be estopped from rejecting its telefaxed BAFO as late because the protester relied on the contracting officer's oral advice that the BAFO would be accepted by GSA if Brookfield submitted it by telefax. According to the protester, the agency cannot escape "responsibility for the statements, actions or inactions of an employee if they have been reasonably and detrimentally relied on by another party." Brookfield claims that it reasonably and detrimentally relied on the contracting officer's statements and attempted to telefax its BAFO instead of trying to hand-deliver the proposal before the submission deadline, resulting in its late delivery.

We find that the agency properly rejected the protester's telefaxed BAFO because the BAFO was not timely received and the paramount cause for the late receipt was Brookfield's failure to begin sending the BAFO until 10 minutes before the deadline. As explained, BAFOs were required to be submitted by 4 p.m. FAR § 15.412(b) places the burden on offerors to see that offers and any modifications to them reach the designated government office on time. Here, Brookfield did not ensure timely delivery of its BAFO since the late receipt was caused solely by Brookfield's failure to allow a reasonable time for the facsimile transmission. See Phoenix Research Group, Inc., B-240840, Dec. 21, 1990, 90-2 CPD ¶ 514. Contrary to the protester's contention, its BAFO was late, not because the contracting officer misjudged the quality or capacity of the agency's facsimile equipment, but because Brookfield's BAFO was telefaxed only 10 minutes before the deadline for receipt of BAFOs, and, therefore, the entire BAFO was not in the possession of GSA until after the 4 p.m. deadline. Under these circumstances, we conclude that the rejection of the BAFO was proper. Id.<sup>3</sup>

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<sup>3</sup>Brookfield's arguments regarding agency error or misjudgment in permitting the facsimile transmission are premised on the theory that, when the contracting officer indicated that he would accept a facsimile transmittal, the contracting officer assumed the protester's responsibility for timely submission of its BAFO. However, when the contracting officer informed the protester that it could submit its BAFO by facsimile transmission, the contracting officer did not amend or suspend the 4 p.m. closing time for receipt of BAFOs. Rather, the agency merely gave the firm permission to telefax its BAFO as a matter of convenience.

(continued...)

Brookfield's assertion that GSA is estopped from rejecting its telefaxed BAFO because the contracting officer allegedly promised acceptance if Brookfield telefaxed the BAFO and hand-delivered a hard copy by 5 p.m. is without merit. Brookfield and all other offerors were informed in writing that BAFOs were required to be submitted by 4 p.m. In addition, Brookfield does not state that the contracting officer told the firm that its offer would be considered timely submitted even if it were received after the 4 p.m. deadline. In any event, it is well established that offerors who rely on oral advice that alters the written terms of the solicitation do so at their own risk. Kollmorgen Corp., 70 Comp. Gen. 551 (1991), 91-1 CPD ¶ 529. Moreover, an agency's actions do not constitute a waiver of an offeror's error or estop the government from rejecting an offer where it is ultimately properly rejected. Martin Contracting, B-241229.2, Feb. 6, 1991, 91-1 CPD ¶ 121. Here, we find that Brookfield's BAFO was properly rejected as late by the contracting officer. Accordingly, regardless of what the contracting officer may have told Brookfield, no estoppel results. Id.

Finally, the protester argues that GSA violated regulations by failing to promptly notify it that its telefaxed BAFO was received late and would not be considered for award. Also, according to the protester, it relied on the contracting officer's representations that Brookfield should not withdraw either of its BAFOs and did not attempt to find another tenant for the offered space.

The protester misunderstands the reason for the delayed notification that its second BAFO was late and for discouraging Brookfield from withdrawing its timely submitted first BAFO. The agency did not immediately notify Brookfield that the firm's telefaxed BAFO was late because Brookfield's first BAFO was the second-low offer received behind the offer of 1999 Broadway, the eventual awardee. If the agency had rejected 1999 Broadway's offer, Brookfield's first BAFO would have been in line for award. Under the circumstances, we think that the agency reasonably discouraged the withdrawal of that offer until the offer of 1999 Broadway was evaluated and found to be acceptable. In addition, since FAR § 52.215-11(g) allows an agency to accept at any time a modification of "an otherwise successful proposal that makes its terms more favorable to the Government," the agency did not immediately reject the firm's late BAFO because, had Brookfield been in line for

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<sup>3</sup>(...continued)

Brookfield was still required to submit the BAFO by the 4 p.m. deadline.

award based on its first BAFO, the second BAFO could have been accepted, even though it had been submitted late.

The protest is denied.



 Robert P. Murphy  
Acting General Counsel